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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 695

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

v.

ROSA LEE ROOSTH,
Respondent.

PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOS. B. RAMEY,
JACK W. FLOCK,
Citizens First National Bank Building,
Tyler, Texas,
Attorneys for Petitioner.

GORDON C. REEVES,
Fort Wayne, Indiana,
Of Counsel.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Lincoln National Life Insurance Company, a corporation, your Petitioner, prays that Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 19, 1962 (R. 1254). Thereafter, in due time, Petitioner filed in said Court of Appeals its Petition for Rehearing (R. 1255). Thereupon, on September 27, 1962, an order was

entered by the majority of said Court of Appeals denying the Petition for Rehearing (R. 1262).

OPINIONS BELOW

The judgment of the Court of Appeals for the Fifth Circuit, for a review of which Writ of Certiorari is sought herein, was an adjudication of the second appeal of this cause. On the first appeal, by a divided court, the Court of Appeals reversed and remanded the cause to the District Court for the Eastern District of Texas for a new trial. On the first trial, the jury having failed to agree upon a verdict, the Petitioner, pursuant to Rule 50b of the Federal Rules of Civil Procedure, filed a motion that judgment be entered in its favor in accordance with its previous motion for a directed verdict. The Trial Court concluded that such motion was well taken, and ordered that judgment be entered in favor of the Petitioner.

In disposing of such first appeal, the majority of the panel of three judges of the Court of Appeals which heard and considered such appeal, entertained the opinion that the trial judge was in error and that a jury issue was raised by the record. The majority opinion on such first appeal is reported in *269 Fed. 2d 171*, and same is attached hereto as Appendix C. The dissenting opinion of Chief Judge Hutcheson is attached hereto as Appendix D.

Motion for Rehearing was duly filed after the decision of the Court of Appeals in the first appeal, and the same was overruled. Thereupon, Petitioner, The Lincoln National Life Insurance Company, filed a Petition for a Writ of Certiorari

in the Supreme Court of the United States, and same was denied on December 7, 1959. *The Lincoln National Life Ins. Co. v. Rosa Lee Leaman Roosth, 361 U. S. 917, 80 S. Ct. 262, 4 L. Ed. 2d 186.*

Upon the second trial of this cause judgment was entered in favor of the Respondent upon a verdict of the jury (R. 1223), after the trial court overruled Petitioner's motion for judgment notwithstanding the verdict, and in the alternative, for a new trial (R. 1222).

The second appeal of this cause was submitted to the Court of Appeals and orally argued on November 13, 1961 (R. 1238). Nearly six months thereafter, on May 8, 1962 (R. 1239), this appeal was considered and taken under submission by the entire court en banc, consisting of nine judges. Finally, on July 19, 1962, the Court of Appeals, by a majority opinion, affirmed the judgment of the District Court, with three judges dissenting. The majority opinion is reported in *306 Fed. 2d 110,* and same is hereto attached as Appendix A. The dissenting opinion of Judge Hutcheson, with whom Judge Jones and Judge Bell joined, is attached hereto as Appendix B.

JUDGMENT SOUGHT TO BE REVIEWED

In accordance with the majority opinion of the Court of Appeals in this cause, judgment was entered on July 19, 1962, a copy of which is hereto attached as Appendix E, ordering that the judgment of the District Court be affirmed (R. 1254), with notation thereon "Hutcheson, Jones and Bell, Circuit Judges, dissent." An order was entered on

September 27, 1962, denying Petitioner's Petition for a Rehearing (which was timely filed by Petitioner), with notation thereon, "Judge Hutcheson, Judge Jones and Judge Bell dissenting." (R. 1262.) A copy of said order is attached hereto as Appendix F.

Pursuant to application, an order was entered in the Court of Appeals, dated October 4, 1962, whereby it was decreed that issuance of mandate in said cause be stayed until final disposition of this cause by the Supreme Court, provided that within ninety days from the date of said order the Clerk of the Supreme Court shall certify to the Clerk of the Court of Appeals that Petition for Certiorari and the record in this cause has been filed in the Supreme Court (R. 1266).

JURISDICTION

The jurisdiction of the Supreme Court is invoked under the provisions of *Title 28, U.S.C.A., Par. 1254(1).*

QUESTIONS PRESENTED

I.

Does a prior decision of a Court of Appeals preclude the same Court of Appeals, upon a second appeal of the same cause, from considering whether or not the prior appeal was correctly decided?

II.

Do the exigencies of judicial administrative consistency compel a Court of Appeals comprising a multiple-judge tri-

bunal, sitting in panels of three judges, to adhere to a decision of the panel on a former appeal of the same cause, especially when the panel assigned to hear the second appeal considered that the first appeal had not been correctly decided?

III.

When a Court of Appeals comprising a multiple-judge tribunal, one panel of which having heard the first appeal of the cause and another panel having heard the second appeal of the same cause and having reached a conclusion contrary to the decision of the first panel, and thereafter the second appeal was referred to the Court en banc, is it proper for the Court en banc to decide the second appeal solely upon the basis of the decision in the first appeal without examination of the record in the first appeal?

STATEMENT OF THE CASE

This action was instituted by the Appellee, Mrs. Rosa Lee Leaman Roosth, against the Appellant, The Lincoln National Life Insurance Company, to recover the proceeds of a policy of life insurance for $50,000.00, which had been issued by the Appellant on December 24, 1956, to Dr. Harold Roosth, in which the Appellee was the beneficiary, and for attorneys' fees and statutory penalties of 12% (R. 1-3). The insured, Dr. Harold Roosth, died on February 7, 1957, which was about six weeks after the issuance of said policy. The Appellant declined to pay the proceeds thereof on the grounds, (1) that the insured, Dr. Harold Roosth, a medical doctor and a specialist in the field of internal medicine, in

his written application for such insurance, made several false statements and misrepresentations of fact concerning the state of his health, and concerning previous examinations by, and consultations with, other physicians regarding his health and physical condition, and concerning the cause of the death of his mother, each and all of which false statements and misrepresentations were wilfully and knowingly made with intent to deceive the Appellant, and same were material and were relied upon by the Appellant in issuing the policy sued upon; and (2) that inasmuch as Dr. Roosth was not in good health when said policy was issued and delivered, the same did not become effective by virtue of the breach of the contractual undertakings by the insured with the insurer (R. 4-13).

Attention is here directed to the fact that at the conclusion of the evidence the Appellant moved the Court to instruct the jury to return a verdict for the Defendant on the ground that the evidence was so uncontradicted that reasonable minds could not otherwise conclude than that Dr. Harold Roosth knowingly and wilfully made the false statements and material misrepresentations as alleged in Appellant's Answer, and that same were made with the intent to deceive and to induce the Appellant to issue said policy, and that same were relied upon by the Appellant, and were material to the risk assumed by the Appellant in issuing the policy; and that such evidence showed, as a matter of law, that the insured, Dr. Harold Roosth was not in good health (except any residual effects of his prior heart attack) at the time he made application for the insurance policy sued

upon and at the time the first premium was paid, as well as at the time of the delivery of said policy, and in consequence thereof, said policy never became effective. Said Motion contains the notation, above the signature of the Trial Judge, that same was timely presented and was by the Court overruled (R. 19-22).

After deliberating from about noontime October 3, 1960 (R. 1165), to 11:40 A.M. October 4, 1961 (R. 1185), the jury returned a verdict in favor of the Plaintiff (R. 1187), and fixed her attorneys' fees in the sum of $12,000.00 (R. 1187).

In due course of time, on October 14, 1960, the Appellant duly filed in the Court below a motion that pursuant to the provisions of Rule 50(b) of the Federal Rules of Civil Procedure, the verdict of the jury should be set aside and that judgment should be entered notwithstanding same in favor of the Appellant; or, in the alternative, that the verdict should be set aside and a new trial ordered (R. 1188-1202).

After both parties had submitted to the Trial Court their briefs bearing upon the issues which were raised in the foregoing motion, the same were set for hearing on oral argument in the Trial Court on November 2, 1960 (R. 1203). Thereupon, the Court overruled said motion, with considerable misgivings, as is reflected by the following comments in the announcement of his decision:

"The Court:

"Well, Gentlemen, I don't think that if I spent two weeks in the library reading these cases, I would be in any better position to decide it than I am right now; for,

I have spent considerable time on them and I have given it considerable thought.

"Now, as to the motion for an instructed verdict, of course, and with all deference to the majority of the Court of Appeals in this case, I firmly believed, at the time I gave the judgment in this case the last time, that Doctor Roosth was guilty of fraud as a matter of law—which defeated his right to recovery.

"I still am of that opinion. And I say that without any disrespect to Judge Cameron and Judge Brown, both of whom I have very high respect for—but, we just don't see alike. But, I am bound by that, as I recognize, of course.

"The motion for an instructed verdict will be overruled. (R. 1212-1213.) * * *

"Now, again, back—with the feeling that I have about this case—it would only be natural that I would have to say that to enter a judgment in this case for the Plaintiff, to me, is a grave injustice.

"But, I bow to the opinion of the majority of the Court of Appeals and wipe that feeling from my mind insofar as this case is concerned.

"Now, then, when we get down to whether or not the Court should have given this requested instruction, I will say this: that, of course, I did not have the benefit of these decisions at the time; although, the matter was thoroughly discussed and I was fully aware of the position of the Defendant in the matter, and certainly it was clearly called to my attention.

"But, if I had it before me today, with the benefit of these briefs I have had and the study I have made of the case, I will say quite frankly, Gentlemen, I would not know what to do with it. The law on this matter is in a terrible state, particularly in the State of Texas. It seems that the Courts are, as fast as they can, getting away from the rule.

"So, being that uncertain about the matter, Gentlemen, I do not think it would be within the keeping of justice for me to grant this new trial.

"So, I am going to overrule the motion for a new trial and I am going to enter a judgment on the verdict." (R. 1212-1214.)

As is indicated in the foregoing comments of the Trial Judge, this cause was previously tried in the District Court, and after the jury was unable to agree, judgment was entered in favor of The Lincoln National Life Insurance Company, upon motion pursuant to provisions of Rule 50(b). An appeal was taken by Mrs. Rosa Lee Leaman Roosth to this Honorable Court of Appeals, wherein judgment of the Court below was reversed and the cause remanded, with Chief Justice Hutcheson dissenting from the majority opinion, in Cause No. 17,426, entitled *Rosa Lee Roosth, Appellant, versus Lincoln National Life Insurance Company, Appellee, 269 Fed. 2d 171.*

As appears from the opinions, the panel that heard and considered the first appeal of this cause was composed of Chief Judge Hutcheson and Judge Cameron and Judge Brown; whereas, the panel that was assigned to hear and consider the second appeal consisted of Chief Judge Tuttle, Judge Hutcheson and Judge Jones. The cause on the second appeal was submitted to and orally argued before the latter panel of three judges on November 13, 1961. As is reflected in the dissenting opinion in the second appeal: "A decision was reached, and an opinion reversing and rendering judgment for the insurer was prepared. Before the opinion was filed, however, a majority of the Circuit Court ordered a

hearing, or rehearing, before the Court en banc, * * *." (Appendix B.). In this connection counsel for all parties received the following letter from the Clerk of the Court of Appeals indicating that the cause had been referred to the Court en banc for further consideration on May 8, 1962:

"March 2, 1962

"Mr. Thomas B. Ramey
Attorney at Law
Tyler, Texas

"Mr. Jack W. Flock
Attorney at Law
Tyler, Texas

"Mr. Chas. F. Potter
Attorney at Law
Tyler, Texas

Re: No. 18830—The Lincoln National Life Insurance Company -vs- Rosa Lee Leaman Roosth.

"Gentlemen:

"Pursuant to Rule 25a of this Court, the Court on its own motion has ordered that this cause be heard before the full Court en banc on May 8, 1962. It will be heard and considered without oral argument on the record and briefs heretofore filed. As the briefs appear to be comprehensive and adequate, the Court does not request additional briefs. The parties are, however, free, if they deem it advisable, to file additional briefs and reply briefs. As the present briefs are lengthy and detailed, the parties are admonished that any such supplemental briefs should be confined to matters not already sufficiently set forth or thought to be required in view of the Court's determination to hear the case en banc. Supplemental briefs, if any, shall be filed not later than

March 27th for appellants and the reply of appellees by April 24, 1962."

"Very truly yours,

EDWARD W. WADSWORTH, CLERK

By /s/ Clara R. James
Chief Deputy Clerk"

In response to the aforesaid notice, as is stated in the majority opinion, counsel for both Petitioner and Respondent declined to submit further briefs. Thereupon, the Court, en banc, proceeded to a consideration of the cause, and by a divided Court—six to three—rendered a decision on July 19, 1962, in which the judgment of the trial court was affirmed (R. 1254). The majority opinion is set forth in Appendix A, and the dissenting opinion is set forth in Appendix B.

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

The Court of Appeals, as reflected in the majority opinion, erroneously held that the decision in this second appeal of the above cause was determined by the decision of the Court upon the former appeal.

II.

The Court of Appeals, as reflected in the majority opinion, erroneously held that the decision of the Court upon a former appeal of this cause precluded the Court from undertaking to reconsider and review its former decision.

III.

The Court of Appeals, as reflected in the majority opinion, erroneously based its decision in this cause upon procedural expediences in the disposition of appeals, rather than upon a consideration of the merits of the cause, as presented by the appeal.

IV.

The Court of Appeals, as reflected in the majority opinion, erroneously extended the doctrine of the law of the case so as to preclude a reconsideration and review of the decision of the Court upon a former appeal.

V.

The Court of Appeals, as reflected in the majority opinion, erroneously rejected the decision on the second appeal by the panel of judges of the Court to which said appeal was submitted, upon the sole ground that the decision in the second appeal should be controlled by a decision of another panel of judges of said Court upon a prior appeal of this cause.

VI.

The Court of Appeals, as reflected in the majority opinion, erroneously rendered its decision in the second appeal solely upon the basis of the majority decision of a panel of three judges in a prior appeal, without having determined that the former appeal was correctly decided.

VII.

The Court of Appeals, as reflected in the majority opinion, erroneously rendered its decision in the second appeal solely upon the basis of the majority decision in a prior appeal, without having examined the record in the former appeal to determine whether or not the decision rendered therein was clearly erroneous and or worked a manifest injustice.

VIII.

The Court of Appeals, as reflected in the majority opinion, erroneously held that the Appellee had not become bound by the recitations in various written instruments which Respondent had offered in evidence without limitation.

IX.

The Court of Appeals, as reflected in the majority opinion, erroneously held that the Trial Court did not err in its charge to the jury, in submitting to the jury for determination those facts which were established by recitations in written instruments that Respondent had offered in evidence without limitation, and by which the Respondent had become bound.

ARGUMENT

Court is Not Precluded on Second Appeal from Determination of Correctness of Its Prior Decision

As is definitely stated in the dissenting opinion by Judge Hutcheson in the second appeal of the instant cause, the panel that heard and considered the second appeal reached

a decision reversing and rendering judgment in favor of the Petitioner. Therefore, as a matter of law, the panel that heard and considered the second appeal evidently concluded that the decision of the majority of the panel that had heard and considered the first appeal, was erroneous. This is substantiated by the following quotation from the dissenting opinion in the second appeal:

> "On the first appeal, a panel of this court, by a divided vote, held that the evidence was sufficient to require submission to a jury. On a second trial, the jury returned a verdict in favor of the plaintiffs-beneficiaries, upon which judgment was entered. A second appeal was heard by a different panel of the court, a decision was reached, and an opinion reversing and rendering judgment for the insurer was prepared. Before the opinion was filed, however, a majority of the circuit judges ordered a hearing, or rehearing, before the court en banc, and a decision affirming the judgment followed. For the reasons which are stated below, I feel it my duty to dissent therefrom."

As is above indicated, an opinion was prepared by the panel that heard the second appeal and before which said cause was orally argued, but before the same was filed with the Clerk, a majority of the judges ordered "a hearing, or rehearing, before the Court, en banc." This action evidently prompted the letter from the Clerk of the Court to counsel, dated March 2, 1926, hereinabove quoted. A reading of the majority opinion of the Court of Appeals sitting en banc clearly reveals that the majority was controlled solely by the desire to adhere to the decision of the majority of the panel that heard and considered the first appeal, and to thereby effect a continuity in the decisions of the Court,

rather than to be governed and controlled by a consideration of the merits of the litigation. This conclusion is substantiated by the following excerpts from the majority opinion:

> "We are aware, of course, that any such approach seemingly gives secondary importance to the intrinsic merits of the particular case, and more serious, to the likelihood of an injustice being done one or more of the litigants. But this helps to bring into focus the basic notion that we are a part of a system of courts of law. It is the aim and hope, of course, of every tribunal that it can work justice in the cause. But it must function with an appropriate awareness that it is the law which it administers. That means, as is true of many procedural as well as substantive requirements, *courts of law must recognize that regard should be given to some factors which are not intrinsically a part of the particular case at hand.* (Emphasis ours.)
>
> "• • •
>
> "With that in mind, we are of the clear view that nothing about this case warrants our exercising the undoubted power to overrule the prior decision reached by the Court on the first appeal. *On the contrary, any effort to re-examine the merits and now declare a result—either the same or a different one—independent of the former decision leads to consequences much more serious to the permanent, objective, administration of justice under law than any supposed individualized injustice to one or all of the litigants.*" (Emphasis ours.)

The majority opinion bases its decision upon "the application of the doctrine of the law of the case."

The primary purposes of the "law of the case" doctrine are those of consistency and of bringing an end to litigation. While these purposes remain commendable, the harm

resulting from a strict adherence to the doctrine is widely recognized. Accordingly, most jurisdictions, either by statute or judicial decision, have developed exceptions to the application of the doctrine so as to avoid the obvious harshness which too often is present in its rigid application. A glaring example appears where the decision on a prior appeal clearly was erroneous. Here, the rule is that which is set out in *Corpus Juris Secundum, Vol. 5B, Par. 1964, p. 556:*

> "While the doctrine of the 'law of the case' is a salutary rule of law, the application of the rule is somewhat a matter of discretion, and it will not be extended beyond the exigencies which demand its application. Rather, it must be applied to the needs of justice with a flexible, discriminating exercise of judicial power; and there is an accelerating trend to make an exception to the rule where it clearly appears that it is being used as an instrument of injustice and the error to be cured far outweighs any harm that may be done in a particular case, especially where no rights have accrued or become vested and no substantial change has been made in the status of the parties by reason of the former decision."

That this exception to a strict adherence to the "law of the case" doctrine is recognized by the Court of Appeals for the Fifth Circuit is reflected in the opinion in *Seagraves v. Wallace, 69 Fed. 2d 163*, wherein it is stated as follows:

> "And even questions which are within the rule of the law of the case, though ordinarily not to be re-examined, are not beyond the power of review. Good practice only, and not jurisdiction, is involved. * * * An appellate court, so long as it has jurisdiction over the controversy, ought to have power to do justice according to law, and should be more ready to correct its own

previous error, if such clearly appears, than to correct the errors of the District Court. Justice is better than consistency."

The Court of Appeals in the *Seagraves* case cites as authority for the view quoted from the opinion, the leading case of *Messinger v. Anderson, 225 U. S. 436, 56 L. Ed. 1152, 32 S. Ct. 739.* In reversing the Circuit Court of Appeals, the Supreme Court, speaking through Mr. Justice Holmes, said:

> "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. * * * In our opinion, even apart from the effect of the state judgment as an adjudication, it should have been followed, if for no other reason, because, at least, as against the decision of the circuit court of appeals, it was right."

The doctrine of the *law of the case* does not carry the same consequences as the *rule of res judicata.* Thus, in *Southern Ry. Co. v. Clift, 260 U. S. 316, 43 S. Ct. 126, 67 L. Ed. 283,* Mr. Justice McKenna, speaking for the Supreme Court, said:

> "The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and res judicata. One directs discretion; the other supersedes it, and compels judgment."

We quote from *Moore's Federal Practice, 2nd Edition, Vol. 1A, p. 4207,* as follows:

> "Hence the federal law of the case, like the doctrine of stare decisis, is not an inexorable command, it must not be utilized to accomplish an obvious injustice. It,

like stare decisis, should be so applied that substantial justice is done in the cases that are being decided. And a departure from the law of the case is not a denial of due process."

The foregoing pronouncement is followed in Texas jurisprudence. Typical of the decisions by the Supreme Court of Texas on this point is *Connecticut General Life Ins. Co. v. Bryson, 148 Tex. 86, 219 S. W. 2d 799.* In such case the Supreme Court of Texas, speaking through Chief Justice Hickman, makes the following unequivocal statement with respect to the recognized power of the Court to correct a former erroneous decision:

> "Rarely has this Court ever consented to re-examine, on the second appeal of a case, its holding on the first appeal of the same case, but its authority to do so and to enter judgment in conformity with its decision upon re-examination, even though such judgment overrules the prior judgment, cannot be questioned. Bomar v. Parker, 68 Tex. 435, 4 S. W. 599; Galveston H. & S. A. Ry. Co. v. Faber, 77 Tex. 153, 8 S. W. 64; Kempner v. Huddleston, 90 Tex. 182, 37 S. W. 1066; Magnolia Park Co. v. Tinsley, 96 Tex. 364, 73 S. W. 5; Green v. Priddy, Tex. Com. App., 112 Tex. 567, 250 S. W. 656. For reasons which will appear in this opinion we have concluded that this is a proper case for the exercise of that authority. The whole case is before us with no change of parties. It would be unthinkable for this Court, after having granted the writ, reconsidered the case, and arrived at the conclusion that the opinion on the former appeal was clearly erroneous, to hold that it is bound by considerations of consistency to perpetuate that error. *Our duty to administer justice under the law, as we conceive it, outweighs our duty to be consistent.*" (Emphasis ours.)

As is also indicated in the dissenting opinion by Judge Hutcheson in the instant case, the doctrine of the law of the case has questionable application in intermediate appellate courts. Judge Hutcheson quotes from *White v. Higgins, 116 Fed. 2d 312*, a decision by the Court of Appeals for the First Circuit, as follows:

> "Our law of the case is not the Supreme Court's law of the case. Our judgment on the second appeal stands or falls on its merits and has no improved standing before the Supreme Court from the fact that it resulted from an application of our law of the case. This being so, it would seem that if on second appeal we thought our earlier opinion was erroneous, we ought sensibly to set ourselves right, rather than to invite reversal above."

The principle announced in the foregoing decision has been adopted by the Supreme Court of Texas in *Burchfield v. Markham, 156 Tex. 329, 294 S. W. 2d 795*. There the Supreme Court of Texas refused to follow an application of the Court of Civil Appeals of the law of the case doctrine.

As is well recognized in the majority opinion, the Court of Appeals for the Fifth Circuit has often "held that this Court is, and must be, free to determine whether, first, the prior decision was erroneous, and more important, whether the circumstances are such that a different result should be reached." (Citing *Seagraves v. Wallace*, supra, and *Commercial National Bank v. Connolly, 76 Fed. 2d 1004.)*

In the footnote to Judge Hutcheson's dissenting opinion in the second appeal, he calls attention to a further decision

by the Court of Appeals for the Fifth Circuit in which the holding is to like effect, viz., *A.T. & S.F. Ry. Co. v. Ballard, 108 Fed. 2d 722.*

Thus it is recognized by the weight of authority that as an integral part of the law of the case doctrine, the effect of a prior decision of the court should be subordinated to the duty of the court to correct such decision on the second appeal if, in its opinion, the former decision is erroneous. Essentially, a correct determination of litigation is of paramount importance. It will be a sad day indeed when our courts assert that they are so bound up and circumscribed by procedural doctrines and dogmas that the ends of justice are subverted.

The majority opinion in the second appeal recognized the soundness of the foregoing principle, but as is so cogently said by Judge Hutcheson in the dissenting opinion, "* * * it is as plain as anything can be that while the opinion gives lip service to that doctrine it does not adhere to it." With apparent apologies, the majority opinion of the Court en banc disregarded a salient feature of the law of the case doctrine when it adhered absolutely to the majority decision of the panel on the first appeal. Obviously, as is revealed in the majority opinion, the majority of the Court en banc based its decision wholly upon the fact that there had been a prior decision on a previous appeal of the same cause that there were raised issues for the determination of a jury.

This prior holding seems to be the sole determining factor that motivated the majority decision of the Court en banc. The majority opinion discloses no evidence at all that the

Court en banc considered whether or not the prior decision in the first appeal was correct. We are forced to the conclusion that the majority opinion is predicated solely on the premise that once a decision in this case had been reached in a prior appeal, such decision is beyond recall, however incorrect it might be. We can find no evidence that the Court en banc ever read the record in the first appeal in order to determine whether or not that appeal was correctly decided. In fact, the inference is deduced from statements in Judge Hutcheson's dissenting opinion that the Court en banc gave no consideration whatsoever to whether or not the first decision was erroneous. We quote from the dissenting opinion as follows:

> "In my view, the most that can be said for the position taken by the majority is that in cases in which the question presented upon appeal is whether the evidence was sufficient to justify or require jury submission, when the evidence is the same as it was on the first appeal, a difference from most other cases, if it can be called a difference, is presented: that it is less likely that clear error in the decision of the prior division will be found, because of the difficulties attending this particular law question. *I do not think that this is sufficient reason to refrain from examination of the first decision.* (Emphasis ours.)
>
> "* * * * * *
>
> "*It is sufficient for me to say, therefore, that as for myself I have carefully examined the record and the previous decision in the case, as I believe it is our duty to do in each such case.* I conclude that the first decision was clearly in error, for the reasons stated in the dissenting opinion in that case and in the unfiled reversing opinion prepared in the case at bar, and that the earlier opinion in therefore not the law of the case." (Emphasis ours.)

That the decision of the Court of Appeals en banc was actuated by a desire of the majority to adhere to the decision in the first appeal, without regard to the merits of the appeal, is emphasized by another significant circumstance. It will be recalled that Chief Judge Tuttle was a member of the panel on the second appeal. In so far as the record discloses, the decision of that panel on the second appeal was unanimous in reversing and rendering the judgment of the Trial Court. It is logical, therefore, to assume that Judge Tuttle was in accord with such decision. Thereafter, when the cause was submitted to the entire Court en banc, Judge Tuttle joined the majority in affirming the cause. If Judge Tuttle did actually join Judge Hutcheson and Judge Jones in the prepared opinion of the second panel, to overrule the decision in the first appeal, then it stands to reason that he was impelled so to do by the desire only to prevent confusion and conflict among the decisions of the Court.

The principal premise upon which the majority opinion of the Court en banc is predicated is that there is no difference in the evidence in the first and second trials of this cause. It may be conceded that there is no substantial difference in the sum total of the evidence which was introduced in the two trials, but there exists a most significant differentiation in the posture and effect of the evidence which was introduced on the second trial in comparison with the evidence that was introduced on the first trial. This state of facts was brought about in the following fashion:

In the second trial of this cause, counsel for the Plaintiff, in presenting Plaintiff's evidence in chief, offered and intro-

duced in evidence, for all purposes, without limitation or restriction whatsoever, among others the following written instruments and documents:

(1) The Admission Note, prepared by Dr. Norman Horwitz from information furnished him by Dr. Harold Roosth when he was admitted to Massachusetts Memorial Hospitals in Boston, Massachusetts, dated November 15, 1950 (Ex. D-17; R. 156-165). Said Admission Note contains the following recitations:

> "This is the 1st MMH admission of this 35 yr. old physician with chief complaint of: *Hypertension — 4 years.*
>
> "Present Illness: About 4 yrs. ago, after discharge from Army with no reservation, it was noted that he had a BP of 160/100-110. * * * About 18 months ago he started having pounding in the head at nite when lying down. This has continued. He has kept on a low cholesterol diet for several years but has not been on Salt restriction, rice diet or veraloid. He has been gaining some weight. His diastolic has risen recently to 120, which prompted him to have some studies. * * *
>
> "Family History: *Mother died at 39 of cerebral vascular accident.* Father died at 61 of coronary—he also had gout. I brother is in the MMH now having had bilateral L-D Splanch for hypertension. * * *
>
> "Physical Exam.: B.P. 190/120 L P 74 R 20."

(2) A document entitled "Preoperative History", dated November 16, 1959 (Ex. D-18; R. 144-152), which was prepared by Dr. Dera Kinsey, or under her direction, from information furnished her at the time by Dr. Harold Roosth

preliminary to her examination of Dr. Roosth. This document contains the following recitations:

> "1. *Known duration of elevated blood pressure—4-5 years.*
>
> "* * * *Mother Died 39—hypertension.*" (Italics ours.)

(3) Letter from Dr. Dera Kinsey to Dr. Harold Roosth, dated November 2, 1950 (Ex. D-20; R. 278-280). Said letter recites that X-ray examinations, Electrocardiograph examinations, Urinalysis examination, Ophthalmoscopic examinations and blood pressure examinations were conducted upon Dr. Harold Roosth during his stay in the Massachusetts Memorial Hospitals on November 15, 1950, and November 16, 1950.

(4) Report of examinations of Dr. Roosth in the Smithwick Foundation Clinic, dated August 3, 1953 (Ex. P-4; R. 192-194). This Report recites that X-ray examinations, Electrocardiograph examinations, Ophthalmoscopic examinations, Urinalysis examinations, blood pressure examinations and Metabolism tests were conducted upon Dr. Harold Roosth in the Smithwick Foundation Clinic or Medical Associates Group on June 11, 1953.

(5) Death Certificate issued by the Mississippi State Board of Health respecting the death of Mrs. Celia Roosth in Mississippi on May 2, 1928 (Ex. P-6; R. 548), wherein the cause of death is recited to be "Heart Block—Chronic Nephritis", and that such diagnosis was confirmed by "Urinalysis".

We respectfully submit that the documentary evidence above mentioned establishes beyond contradiction that Dr. Roosth, in his application for the insurance here involved, made false statements, misrepresentations, and concealments in respect to the following facts:

(1) That his mother did not die of childbirth, contrary to the recitations in his application for insurance;

(2) That he did not disclose that he had been in the Clinic of the Medical Associates Group or the Clinic of the Smithwick Foundation, or the Massachusetts Memorial Hospitals in Boston, Massachusetts, for observation, treatment or operation;

(3) That he did not disclose the names of Dr. Kinsey and the other physicians who observed him, or examined him, in the Clinics and Hospitals;

(4) That he did not reveal that "any physician in the past five years found" his blood pressure above normal;

(5) That he did not reveal that he had had X-ray, Electrocardiograph, and blood studies in 1950, 1951, and 1953 in the Medical Associates Clinic or the Smithwick Foundation Clinic or the Massachusetts Memorial Hospitals;

(6) That he did not reveal that he had consulted Dr. Dera Kinsey or Dr. Reginald H. Smithwick during the preceding five years for hypertension.

Moreover, contrary to the plan which was pursued by Plaintiff in the previous trial, Plaintiff offered in evidence

the documents which are hereinbefore listed, most of which were offered in evidence by the Defendant in the previous trial.

Having elected to offer such evidence, as above mentioned, the Plaintiff not only vouched for the veracity and integrity of same, but Plaintiff thereby eliminated from any possibility of disputation the factual issues which were established by such evidence. Therefore, from the standpoint of the existence of issues of fact which should be submitted for jury determination, this second trial presents an entirely different situation that that which prevailed in the first trial of this cause. Consequently, it is submitted that the first decision of the Court of Appeals which remanded this cause for a jury trial upon certain issues, has no application and is not determinative in the second trial. This is for the reason that certain of the controlling issues which the Court of Appeals directed to be submitted to the jury are in this trial established beyond controversy by virtue of the procedure which was followed by counsel for Plaintiff in this trial, as above mentioned.

The principle of law is well recognized that whenever a party introduces written evidence bearing upon an issue, without limiting its purpose, such party becomes bound by all of the recitations contained in such written evidence and cannot be heard to aver against it. In a recent opinion by the Court of Civil Appeals at Texarkana in *Lock v. Morris (Error refused, N. R. E.)*, *287 S. W. 2d 500*, a synopsis

of the legal authorities on this question is reproduced with approval, and we quote therefrom as follows:

> "'In 17 Texas Jurisprudence, pages 928-929, No. 419, it is stated:
>
> "'"As a general rule documentary evidence is held to be conclusive against the party introducing it; he may not impeach it; nor will he be permitted to accept a part of it which is in his favor and repudiate another part which is opposed to his claim of defense."
>
> "'In 32 C. J. S., Evidence, pp. 1113-1114, Sec. 1040 (D), it is stated:
>
> "'"It has been said to be unquestionably the general rule that a party who introduces documentary evidence to support his contention vouches for its integrity and is conclusively bound thereby. A more common statement is to the effect that a party introducing documentary evidence is, at least if he introduces it without qualification or reservation, bound thereby, for all purposes, and cannot impeach it, but vouches for its accuracy so far as the issue on which it bears is concerned."

In *Artmoore Co. v. Dayless Mfg. Co., Inc. (Cert. denied), 208 Fed. 2d 1*, the United States Court of Appeals for the Seventh Circuit held where that an affidavit was offered without limitation by the plaintiff, because of an alleged admission therein by the defendant against interest, the plaintiff became bound by all of the recitations in such instrument and could not escape the other recitations therein which were favorable to the defendant.

Majority Rejected Decision of Panel to Which Second Appeal Was Assigned

As was conclusively demonstrated in Judge Hutcheson's dissenting opinion in the instant case, the panel to which the

second appeal was assigned entertained the submission of the cause and heard the oral argument therein on November 13, 1961. After due and deliberate consideration of said appeal, it appears from the reading of Judge Hutcheson's dissenting opinion that such panel of Judges agreed upon a decision to reverse and render the cause in favor of the Petitioner. An opinion was prepared to such effect, but before the same was filed a majority of the Judges ordered a submission of the second appeal before the entire Court en banc. Palpably, such action was taken on the ground that the decision on the second appeal overruled the decision on the first appeal of this cause.

Rule 25a of the Court of Appeals for the Fifth Circuit, which provides for a hearing or rehearing en banc, reads as follows:

> "A hearing or rehearing before the Court en banc as permitted by Section 46(c) of Title 28 United States Code, may be ordered by a majority of Circuit Judges in active service for any reason which appears to them sufficient in the particular case. Ordinarily, a hearing or rehearing en banc is not ordered except: (1) when necessary to secure or maintain uniformity or continuity in the decisions of the Court, or (2) when unusually important or novel questions are to be decided."

Obviously, the en banc hearing was ordered on the basis of the first ground stated in the above Rule, to-wit: "When necessary to secure or maintain uniformity or continuity in the decisions of the Court."

We contend that uniformity or continuity in the decisions of the Court should be subservient to the administration of

justice and that just because a decision of a Court happens to be the first expression of the Court on the subject matter in litigation, it is not necessarily, by virtue of its priority, a correct decision. It is apparent that the majority of the Court en banc totally disregarded the decision of the panel assigned to hear the second appeal and which actually heard and considered the same for a period of more than three months. It has been demonstrated heretofore that the decision and opinion of the panel which heard the second appeal was discarded and cast into the waste basket, simply because the prior decision had seniority in point of time and was in conflict with the decision of the panel hearing the second appeal.

This statement is further substantiated by the fact that Judge Brown, who wrote the majority opinion of the Court en banc, was not a member of the panel which heard and considered the second appeal. He was not present at the submission of said appeal, nor did he hear the oral argument which was presented thereat.

Judge Brown was a member of the panel to which the first appeal was assigned, and he concurred in Judge Cameron's majority opinion in the first appeal. It is apparent that only a total of five Judges served on both of the panels which heard the first and second appeals of this cause. Three Judges who concurred in the majority opinion of the Court en banc were not members of the panels hearing either the first or second appeals. In order for a correct determination of the issue of whether or not the first appeal had been erroneously decided, it was necessary to review and consider the record in both appeals. We may assume that

the entire Court en banc considered the record in the second appeal, but it does not appear that more than three judges of the entire Court had given consideration to the record in the first appeal. Unless all of the judges gave consideration to the record in the first appeal, how could it be judicially determined that the first appeal had been correctly decided?

If, on the second appeal, the cause had not been referred to the entire Court en banc, it is evident that a different decision would have resulted. If, on the first appeal, the cause had been referred to the entire Court en banc, perhaps a different decision would have been reached. In the light of the status in which this cause now finds itself, who can say advisedly whether the decision on the first appeal or the decision on the second appeal is a correct adjudication of the issues at law presented by these appeals?

It is self-evident from reading the opinions in this cause that the overriding factor which controlled the majority of the Court sitting en banc was judicial expediency. In other words, the desire to put an end to litigation was of more importance than a correct decision of the litigation.

CONCLUSION

Fundamentally, may we reiterate that our Courts are constituted for the ultimate purpose of rendering correct, just and righteous determinations of controversies between litigants. Such was intended to be, and should be, the polar star which guides all judicial tribunals. We deplore the modern tendency of some of our Courts to render decisions with such speed and dispatch as may be in derogation of

justice. Is the desire to "clear the dockets" the chief motivation of our Courts and does the desire of our Courts to be consistent outweigh their duty to administer justice under the law? It is our sincere opinion that the answer to this question as related to the instant cause requires the granting of this Petition for Writ of Certiorari.

Respectfully submitted,

THOS. B. RAMEY

JACK W. FLOCK
Citizens First National Bank
Bldg.,
Tyler, Texas,
Attorneys for Petitioner.

In the

Supreme Court of the United States

OCTOBER TERM, 1962

No.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Petitioner,

v.

ROSA LEE ROOSTH,
Respondent.

CERTIFICATE OF SERVICE

I, the undersigned, THOS. B. RAMEY, Attorney of Record for THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, Petitioner in the above styled and numbered cause, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 20th day of December, 1962, I served two copies of the above PETITION FOR WRIT OF CERTIORARI which is being presented for filing in the Supreme Court of the United States in Cause entitled "The Lincoln National Life Insurance Company, Petitioner, v. Rosa Lee Roosth, Respondent" by causing same to be deposited in the United States Mail addressed to Hon. Charles F. Potter, Attorney for the Respondent, at his office in the Peoples National Bank Building, Tyler, Texas.

THOS. B. RAMEY,
Citizens First National Bank Building,
Tyler, Texas,
Attorney for Petitioner, The Lincoln National Life Insurance Company.

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18830

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Appellant,

versus

ROSA LEE LEAMAN ROOSTH,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(July 19, 1962)

Before TUTTLE, Chief Judge, HUTCHESON, RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

BROWN, Circuit Judge, joined by TUTTLE, Chief Judge, RIVES, CAMERON, WISDOM and GEWIN, Circuit Judges: This is the second appearance of this case. On the first trial the District Court after the jury was unable to agree on a verdict, discharged the jury and thereafter entered

j.n.o.v. for the Insurer pursuant to its earlier motion for a directed verdict, F.R.Civ.P. 50(b). When that judgment for the Insurer came here on appeal, this Court, by a divided vote, reversed and remanded the case for a new trial. *Roosth v. Lincoln National Life Insurance Co.*, 5th Cir., 1959, 269 F. 2d 171. Because of the detailed recitation of the facts in that opinion, it is unnecessary to repeat or even summarize them here.

On the retrial pursuant to our mandate, the jury returned a verdict for the beneficiaries of the Assured and against the Insurer. The District Judge made it plain that because of our decision he felt compelled to enter judgment on the verdict against the Insurer. It is equally plain that had it been left to him, he thought the evidence insufficient as a matter of law to sustain any such judgment.

The case then came back again to this Court with only two differences—neither of which are decisive—from the prior appeal. First, it was the Insurer, not the Assured, that was seeking to upset the Trial Court's action. Second, the record while substantially the same in its total teachings and effect, differed in its structure in that documents offered by the Insurer on the first trial to substantiate its charge of fraudulent misrepresentation of prior medical history were on this second trial offered by the Assured. But apart from the technical question of evidence which we discuss briefly later on, the record, in a very real, practical and legal sense, was and is identical.

In the routine assignment of cases to the calendar for argument, the second appeal was presented to a panel of this Court different from that deciding the first appeal. After oral argument before that panel, the serious question arose whether, on this identical record, the second panel was in agreement with the decision of the former panel that the evidence was legally sufficient to make a jury issue. In view of this, the Court on its own motion and prior to decision of the second panel ordered the case resubmitted to the full Court. 28 USCA § 46(c). See also 5 Cir. R. 25a.

The parties were invited to file such supplemental briefs as were thought necessary, but after informal consultation between them, counsel commendably concurred in the view that everything that could be said, pro and con, had already been set forth in able briefs filed on the two appeals. Consideration by the full Court on these briefs verified the initial impression that we are here dealing with a record which is as identical as can ever be achieved considering the unavoidable nuances in the testimony of living witnesses.

The reconsideration of this identical record by the second panel and now by the full Court revealed another thing of equal positiveness. There are no differences among the Judges of this Court on the questions of law as such. The differences, such as they exist, relate to the facts. It is true, of course, that whether the evidence is sufficient to make out a jury case is a question of law. *Marsh v. Illinois Central R.*, 5 Cir., 1949, 175 F. 2d 498. *Kirby Lumber Corp. v. Laird*, 5 Cir., 1956, 231 F. 2d 812; *Whiteman v. Pitrie*, 5 Cir., 1955, 220 F. 2d 914. But it is one only in relation to the particular

facts of the particular case. There is no disagreement over the controlling standard, only on whether the evidence does, or does not, satisfy that standard.

It is that absence of any disagreement on controlling legal principles and the very substantial actual sameness of the two records which leads us to the conclusion that this is a case *calling imperatively for the application of the doctrine of the law of the case.*

This, we emphasize, is a deliberate choice and is in no sense the product of any erroneous notion that, as a matter of sheer power, application of that doctrine is mandatory. This would, of course, turn our backs on the principle so aften recognized by this Court that while this is a rule guiding decision in a given case, the Court is not compelled to follow its former decision. We have too often held that this Court is, and must be, free to determine whether, first, the prior decision was erroneous, and second, and more important, whether the circumstances are such that a different result should be reached. *Seagraves v. Wallace*, 5 Cir., 1934, 69 F. 2d 163; *Commercial National Bank v. Connolly*, 5 Cir., 1949, 176 F. 2d 1004. Of course this approach is consistent with such leading cases as *Messinger v. Anderson*, 1912, 225 U. S. 436, 32 S. Ct. 739, 56 L. Ed. 1152; *Remington v. Central Pacific R. Co.*, 1905, 198 U. S. 95, 25 S. Ct. 577, 49 L. Ed. 959; *United States v. United States Smelting Co.*, 1950, 339 U. S. 186, 70 S. Ct. 537, 94 L. Ed. 750; *Insurance Group Committee v. Denver & R.G.W.R. Co.*, 1947, 329 U. S. 607, 67 S. Ct. 583, 91 L. Ed. 547.

But we think that when the issue resolves itself, as it does so clearly here, into a question of whether the same body of evidence is enough to permit a jury submission, neither a subsequent, second, or third, panel of this Court, nor the whole Court sitting en banc, should ordinarily undertake to review the correctness of the first decision or, doing so, arrive at a contrary conclusion. This approach has been many times expressed by some of our sister Courts of Appeals and no statement is better than that of the Eighth Circuit.

> "This court has repeatedly held that the decision on former appeal is the 'law of the case' on a question presented in that former appeal, unless the evidence introduced at the subsequent trial is substantially different from that considered on the first appeal, and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless that decision is clearly erroneous and works manifest injustice. The introduction of new testimony at the second trial which is merely cumulative will not prevent the application of this doctrine on the second appeal. While this rule of practice is not a limit of power, it is nevertheless a salutary one, and should be departed from only after careful consideration on situations arising in specific cases." Chicago, St. P. M. & O. Ry. Co. v. Kulp, 8 Cir., 1939, 102 F. 2d 352, 354.[1]

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[1] Similar cases include New York Life Ins. Co. v. Golightly, 8 Cir., 1938, 94 F. 2d 316; Williams v. Order of Commercial Travelers of America, 6 Cir., 1930, 41 F. 2d 745; General Motors Acceptance Corp. v. Mid-West Chevrolet Co., 10 Cir., 1934, 74 F. 2d 386; Priester v. Southern Ry. Co., 4 Cir., 1925, 6 F. 2d 878; Dodd v. Union Indemnity Co., 4 Cir., 1929, 32 F. 2d 512; Louisville Trust Co. v. National Bank of Kentucky, 6 Cir., 1939, 102 F. 2d 137; Electrical Research Products, Inc. v. Gross, 9 Cir., 1941, 120 F. 2d 301.

If taken literally, the Sixth Circuit, in this situation apparently would hold that the "former decision is conclusive." Carpenter v. Durell, 6 Cir., 1937, 90 F. 2d 57, 58.

We are aware, of course, that any such approach seemingly gives secondary importance to the intrinsic merits of the particular case, and more serious, to the likelihood of an injustice being done one or more of the litigants. But this helps to bring into focus the basic notion that we are a part of a system of courts of law. It is the aim and hope, of course, of every tribunal that it can work justice in the cause. But it must function with an appropriate awareness that it is the law which it administers. That means, as is true of many procedural as well as substantive requirements, courts of law must recognize that regard should be given to some factors which are not intrinsically a part of the particular case at hand.

Of these other factors, a most important consideration is stability in the law—a sort of permanence and sureness in decision apart from the make-up or composition of the particular tribunal so far as the person of the Judges is concerned. That, of course, is a matter of growing concern to Courts such as this one in which, as a multiple Judge tribunal, we sit by statute in panels of not more than three Judges. 28 USCA § 46(c). In more tranquil days and times, an appeal from a second trial would be heard by the same Court as the first appeal. Now, that is highly unlikely, and where it occurs, it is—at least in this Court—due entirely to the laws of chance. That puts a premium on multiple appeals. That is so because, without implying any improper purpose to litigants or their counsel, or acknowledging anything more than, as human beings, Judges will unavoidably have differences in emphasis, approach, or views on close

questions in given areas, if the practice is followed for each succeeding panel to arrive at its own decisions, the losing party on the first appeal will naturally strive to bring back a second, or a third, or a fourth time until all are exhausted. This possibility involves something other than simply more grist for our mill and as to which we should be indifferent. One of the vices is that whether a litigant gets a second, or a third time at bat likewise depends so much on chance, or at least on factors making it most unfair that in one situation a second trial and appeal is available while in another one it is lacking. A variety of possibilities will illustrate these unpredictables: the trial Court enters judgment for a plaintiff on a jury verdict, and we reverse for failure to grant an instructed verdict, but send it back for a new trial because no proper motion for *j.n.o.v.* has been made, see *Yorkshire Indemnity Co. v. Roosth & Genecov Production Co.*, 5 Cir., 1958, 252 F. 2d 650, 657-58. Another trial Judge, in substantially the same kind of case, takes a bolder course, grants the motion for directed verdict and enters judgment for a defendant which on appeal we affirm. In the former situation, the parties will have a second chance and a second appeal. In the latter, it will be a one-shot affair. Countless other variations may readily be envisioned.

We think that in a multi-Judge Court it is most essential that it acquire an institutional stability by which the immediate litigants of any given case, and equally important, the bar who must advise clients or litigants in situations yet to come, will know that in the absence of most compelling circumstances, the decision on identical questions, once made,

will not be re-examined and re-decided merely because of a change in the composition of the Court or of the new panel hearing the case.

With that in mind, we are of the clear view that nothing about this case warrants our exercising the undoubted power to overrule the prior decision reached by the Court on the first appeal. On the contrary, any effort to re-examine the merits and now declare a result—either the same or a different one—independent of the former decision leads to consequences much more serious to the permanent, objective, administration of justice under law than any supposed individualized injustice to one or all of the litigants.

We need mention only briefly two new matters upon which the Insurer, independent of the sufficiency of the evidence, urges a reversal and remand for still a third trial. As to the first, we do not think that because the Assured offered the documentary evidence containing the asserted fraudulent misrepresentations, the oral testimony offered thereafter by the Assured was an impermissible impeachment such as is frequently discussed. See 32 C.J.S. Evidence, §1040(d) at 1113-14; 17 Tex. Jur. Evidence §419.[2] Such oral testimony,

[2]The Insurer stresses these Texas cases. Lock v. Morris, Tex. Civ. App., 1956, 287 S. W. 2d 500 (error ref. n.r.e.); Seifert v. Brown, Tex. Civ. App., 1932, 53 S. W. 2d 117 (error ref.); Stancil v. Mills & Exports Co., Tex. Civ. App., 1940, 146 S. W. 2d 787 (no writ history); McClung Construction Co. v. Langford Motor Co., Tex. Civ. App., 1930, 33 S. W. 2d 749 (no writ history); Lincoln v. Pohly, Tex. Civ. App., 1959, 325 S. W. 2d 170 (error ref. n.r.e.); Parkerson v. American Hospital & Life Ins. Co., Tex. Civ. App., 1959, 322 S. W. 2d 27 (error dismissed); Freed v. Bozman, Tex. Civ. App., 1957, 304 S. W. 2d 235 (error ref. n.r.e.); McDonald v. Grant, Tex. Civ. App., 1958, 312 S. W. 694 (error dismissed); Vincent v. Vincent, Tex. Civ. App., 1958, 320 S. W. 2d 217 (error ref. n.r.e.); Foster Wheeler Corp. v. Western Wood Products Co., Tex. Civ. App., 1958, 324 S. W. 2d 45 (no writ history).

at most, was explanatory, and analogous to the offering of other oral testimony, not as impeachment of the veracity of a witness, but merely to prove the truth of the particular facts, even though in contradiction of the story related by such witness. This is quite permissible. As to the second, a fair reading of the charge as a whole negatives any idea based on literalism of the instructions that the jury was misled. It is plain that the question submitted was not whether the various statements, answers, etc. charged to be fraudulent were in fact made, but whether—as made, as they admittedly were—they were made with the requisite Texas intent to deceive or defraud.

Thus, as it must to all things and all cases, this one now comes to an end.

AFFIRMED.

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20 Am. Jur., Evidence §915; 58 Am. Jur. Witnesses §797; McCormick and Ray, Texas Evidence §636; Trice Production Co. v. Dutton Drilling Co., Tex. Civ. App., 1960, 333 S. W. 2d 607 (error ref. n.r.e.); Masterson v. Bouldin, Tex. Civ. App., 1941, 151 S. W. 2d 301 (error refused); Brumit v. Cokins, Tex. Civ. App., 1955, 281 S. W. 2d 154 (error ref. n.r.e.); Independent Indemnity Co. v. Pope, Tex. Civ. App., 1929, 14 S. W. 2d 330 (error dismissed); Pruett v. Mabry, Tex. Civ. App., 1954, 268 S. W. 2d 532 (error ref. n.r.e.).

APPENDIX B

HUTCHESON, Circuit Judge, with whom Judge JONES and Judge BELL join, Dissenting:

When the case was first here, it had been tried to a jury in the district court, and the jury, having been unable to agree, had been discharged and judgment for the defendant entered by the court. On the first appeal, a panel of this court, by a divided vote, held that the evidence was sufficient to require submission to a jury. On a second trial, the jury returned a verdict in favor of the plaintiffs-beneficiaries, upon which judgment was entered. A second appeal was heard by a different panel of the court, a decision was reached, and an opinion reversing and rendering judgment for the insurer was prepared. Before the opinion was filed, however, a majority of the circuit judges ordered a hearing, or rehearing, before the court en banc, and a decision affirming the judgment followed. For the reasons which are stated below, I feel it my duty to dissent therefrom.

Although the majority declares that it respects and follows the doctrine, time-honored and well established in this circuit, at least, that the decision on a former appeal is the law of the case on questions of law then and there presented, *unless the former decision is clearly erroneous and works manifest injustice*, and that this doctrine does not constitute a limitation upon the power of the court to reconsider and if necessary overrule the earlier decision, in the light of the action taken, and declined, by the majority, and of the subsequent language in its opinion, it is as plain as

anything can be that while the opinion gives lip service to that doctrine it does not adhere to it. Substituted in its stead by the majority is an entirely new rule for application in the particular class of case here under consideration. It is a rule which completely eliminates the narrow latitude, carefully limited and circumscribed, formerly available to the court in the application of the doctrine of the law of the case. It is a rule which apparently attaches to the earlier decision the conclusive effect of res judicata.

With deference to the views of my brothers, I am unable to perceive either the authority for or the wisdom of abandonment of the doctrine of the law of the case, or of the adoption of a new rule respecting it, in this or any other kind of case. On the contrary, I think that both reason and authority support the conclusion that it is the duty of the court in any case properly before it, as a prerequisite to implementation of an earlier decision as the law of the case, to determine whether that decision was clearly in error, and if it was, whether the circumstances are such that a different result should be reached. These determinations require and demand consideration of the case on its merits. Any other course renders empty and meaningless the right of appeal given by Congress to a party aggrieved by the judgment of the trial court, by making the court which hears the appeal a mere "rubber stamp". This anomalous result is best illustrated by the case at bar. Here the disagreement among the members of the court was considered sufficient to necessitate a hearing before the court en banc. Yet in disposing of the case, a majority of the entire court

neither deals with the merits nor applies the doctrine of the law of the case, but holds itself constrained to merely "rubber stamp" the prior decision of two judges, without examination of the correctness of that decision.

The principal case cited by the majority, *Chicago, St. P. M. & O. Ry. Co. v. Kulp*, 102 F (2) 353, 354 (8th Cir. 1939), as support for its approach, in fact supports only the traditional application of the doctrine of the law of the case, even in situations where the evidence is the same on successive appeals and the question relates to its sufficiency to justify jury submission,[1] as this portion of that opinion quoted by the majority reveals:

> ". . . the 'law of the case' . . . must be followed . . . [in such circumstances] *unless [the former] decision is clearly erroneous and works manifest injustice . . . [T]his rule of practice . . . should be departed from only after careful consideration on situations arising in specific cases.*" (Emphasis added)

In this circuit, the traditional doctrine of the law of the case has always been followed heretofore.[2]

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[1] My reading of the cases cited in footnote 1 of the majority opinion reveals that the language of Louisville Tr. Co. v. National Bank of Kentucky, 102 F. (2) 137 (6th Cir. 1939); General Motors Acceptance Corp. v. Mid-West Chevrolet Co., 74 F. (2) 386 (10th Cir. 1934); and Williams v. Order of Commercial Travelers of America, 41 F. (2) 745 (6th Cir. 1930) supports application of the traditional doctrine of the law of the case. Electrical Research Products, Inc. v. Gross, 120 F. (2) 301 (9th Cir. 1941) takes no position whatever on the question. In Priester v. Southern Ry. Co., 6 F. (2) 878 (4th Cir. 1925) the circumstances were such that the judgment of the trial court on the second trial was in effect entered on the mandate of the appellate court. The view taken by the Sixth Circuit in Carpenter v. Durell, 90 F. (2) 57 (6th Cir. 1937), that the first decision on appeal is conclusive, seem s not to have been followed in that circuit. See e.g. Louisville Trust Co. v. National Bank of Kentucky, supra.

[2] In addition to Seagraves v. Wallace and Commercial National Bank v. Connolly, cited by the majority, see Atchison, T. & S.F. Ry. Co. v. Ballard, 108 F. (2) 722 (5th Cir. 1940).

In my view, the most that can be said for the position taken by the majority is that in cases in which the question presented upon appeal is whether the evidence was sufficient to justify or require jury submission, when the evidence is the same as it was on the first appeal, this difference from most other cases, if it can be called a difference, is presented: that it is less likely that clear error in the decision of the prior division will be found, because of the difficulties attending this particular law question. I do not think that this is sufficient reason to refrain from examination of the first decision.

Nor do I think that the fact that the size of the court has increased in recent years is a factor which militates in favor of the majority position. While it is certainly true that the composition of a panel of this court by which a given case will be determined on appeal is governed by the law of chance—from the standpoint of the parties—it need not be so from the standpoint of the court, upon whose shoulders rests responsibility for the proper administration of the judicial process, for there is nothing which prohibits assignment of successive appeals to the same panel. In terms of economy of judicial energy as well, this procedure has much to recommend it. The fact that the parties may or may not be entitled under the law to, or avail themselves of, multiple appeals seems to me to be of no relevance to the problem at hand. Our primary concern is not with the fact that an appeal may be taken, but with the scope of our duty when the case reaches us.

While no disagreement will be found with the proposition that stability and predictability in the law, as well as the expeditious termination of litigation, are desirable goals in the administration of justice, I think it questionable that the rule announced by the majority materially advances those worthy ends. It might if we were a court of last resort. We must not, however, lose sight of the fact that we do not have the infallibility of finality, and that the litigants have access to yet another court for review of our decision *on its merits*. As the Court of Appeals for the First Circuit has said:

> "Our law of the case is not the Supreme Court's law of the case. Our judgment on the second appeal stands or falls on its merits and has no improved standing before the Supreme Court from the fact that it resulted from an application of our law of the case. This being so, it would seem that if on second appeal we thought our earlier opinion was erroneous, we ought sensibly to set ourselves right, rather than to invite reversal above." White v. Higgins, 116 F (2) 312, 317 (1st Cir. 1940)

This statement accords fully with my own views.

By reason of its effectuation of a rule which prevents re-examination of the earlier decision, the majority gives no other basis or reason for affirmance of the judgment in this case. It is sufficient for me to say, therefore, that as for myself I have carefully examined the record and the previous decision in the case, as I believe it is our duty to do in each such case. I conclude that the first decision was clearly in error, for the reasons stated in the dissenting opinion in that case and in the unfiled reversing opinion pre-

pared in the case at bar, and that the earlier opinion in therefore not the law of the case. Turning to the merits, I am of the opinion that the insurer was and is entitled to an instructed verdict as a matter of law, and would reverse the judgment of the trial court and render a verdict for the insurer accordingly. I, therefore, dissent from the opinion of the majority.

APPENDIX C

In the

United States Court of Appeals

FOR THE FIFTH CIRCIUT

No. 17426

ROSA LEE ROOSTH,

Appellant,

versus

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(July 30, 1959)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: December 24, 1956, Dr. Harold Roosth (insured), a practicing physician in Tyler, Texas, applied to The Lincoln National Life Insurance Company (insurer) for $50,000 life insurance with appellant Rosa Lee Roosth, his wife, as beneficiary. The policy was issued on the same date after the usual medical examina-

tion and was delivered to insured soon thereafter. After paying two monthly premiums the insured died February 7, 1957, the death certificate showing as the cause of death "Sub-arachnoid hemorrhage due to ruptured aneurism." The insured declined the beneficiary's claim under the policy on the ground that insured had made false statements and misrepresentations in his written application for the policy knowing they were false and making them with intent to deceive the insurer, claiming that said false statements and misrepresentations were material to the risk assumed by insurer and were relied upon by it and it was induced thereby to issue the policy; and that the insured was not in good health when the policy was issued and delivered to him.

This civil action brought by the beneficiary was tried before court and jury and, after prolonged deliberation, the jury reported its inability to agree upon a verdict and was discharged. Thereupon the court, after hearing argument and considering briefs, entered judgment granting insurer's motion for directed verdict based upon the averment that each of the defenses relied upon by had been established by "the uncontradicted and/or great preponderance of the evidence." The question presented by this appeal is whether the defenses relied upon were established by evidence of such character that the court below was justified in deciding that no jury issues were presented, and that the defenses should be sustained as a matter of law; and that the insurer had not waived, or was not estopped to prevail on, its motion for directed verdict by reason of notice of facts omitted from the application it acquire prior to the issuance of the policy.

A careful reading of the record and briefs convinces us that, under Texas law, the evidence required that the issues be decided by the jury and that it was error to decide them as a matter of law.

The trial below was prolonged and the record is made up largely of the testimony of nine doctors who gave their opinions based, to a large degree, upon hypothetical questions. Without doubt, there is support in the record for a jury finding in favor of the insurance company, but that is not the question which is before us. Ours is the duty to search the record to see if it contains credible evidence from which the jury would have been warranted in finding for the appellant. The opinion, therefore, will be confined largely to pointing out the evidence favorable to the appellant and the law of Texas under which, in our opinion, a case for the jury was made out.

A few fundamental facts should be kept in mind as the details are considered. The first is that Lincoln made a specialty of substandard risks and its premium charges were based accordingly. The annual premium normally applying to the policy issued to insured was $1094.00 per year, while the charge made for the policy issued to him was $1,922.00 per year, an uprating of 74.7 per cent. The insurer knew that the doctor had had a myocardial infarction, commonly known as a coronary thrombosis, in 1948, and that the American General Insurance Company had, five years thereafter issued him a rated-up policy.[1] Insured knew that he

[1]The record reveals that Lincoln was reinsurer of some of American General's risks that they swapped information and cooperated in determining whether applications for insurance would be accepted.

was a permanent cardiac or cripple and, despite his comparative youth, had cut down on his activities to protect himself from future attacks. He was inevitably heart conscious and was probably never free from a measure of anxiety and foreboding. The insurer also knew this. That occurrence was the basic ingredient of the contract between the two and the congeries of considerations attending it, the causes, the concomitants and the consequences were logally taken into account in the execution of the contract, and every act by the parties in connection with it should be interpreted in the light of this fundamental fact.

The idea of insurance originated, not with the insured, but with the insurer. The insured felt sufficiently encouraged concerning his recovery and general physical condition to go in with his brother, also a doctor, and construct a clinic, which was occupied in the year 1956. Insured was exploring the coverage of the mortgage on the clinic by what was referred to as "mortgage insurance." But Lincoln's agent learned of the situation and importuned insured to purchase life insurance instead, sending in to Lincoln on Nov. 1st an inquiry whether it would be interested in writing it. The amount desired by insured was $26,000, and the application first signed by him November 10, 1956 was for a policy in that amount. The agent inserted in that application the request that an additional policy in the amount of $24,000 be issued. The physical examination by the company examiner, Dr. C. B. Young, was based upon the November 10th application. Insurer's agent, however, testified that the policy was issued on the application dated

December 24th, but upon the medical examination made November 11th.

Lincoln pled affirmatively that insured willfully made false answers to specific questions asked him by the medical examiner, as set out in the footnote.[2] It is first complained that insured misrepresented the cause of the death of his mother. Since insured was thirteen years of age at the time of her death, it is clear that he knew nothing of the cause and the answer on his application is bound to have been the repetition of what he had heard. His brother explained that family history revealed—as the brother expressed it, they were taught—"That she died from a kidney condition resulting from childbirth." That is essentially what the death certificate showed.

The Company introduced evidence that, in 1950, insured told someone making a physical examination of him that his "mother died at 39 of cerebral vascular accident." His recollection then was no better apparently than it was when

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[2] "9. Mother Age at Death 40 Cause of Death—Childbirth."

"11. Have you now any disease or disorder? If yes give full particulars." Answer: "No."

"13. Have you ever been in a hospital, clinic, sanitarium or institution for observation, treatment or operation? If so, give date and details * * *."

Answer: "Medical Center Hosp. Nov. 1955.
Mother Frances [Hospital]
Hemmorrhoidectomy 1950
Porter Bailes, Jr. [Surgeon]

"14. Have you ever had any of the following diseases or symptoms? a. Apoplexy, Paralysis, Epilepsy, Loss of Consciousness, Dizziness, Nervous Breakdown, Headaches." Answer: "No."

"g. Has any physician in past five years found your blood pressure above normal?" Answer: "No."

"h. Have you ever had X-ray, electrocardiogram or blood studies? If so, give full particulars." Answer: "No."

"i. Have you consulted any physicians or practitioners the past five years for any other causes?" Answer: "No."

In connection with this evidence it should be considered that Lincoln, in its manual of instructions to medical examiners, advised that blood pressure history beyond five years should usually be disregarded; and, as to a more recent history, the following instruction was given: "History three to five years ago—if highest systolic in history 3 to 5 years ago was less than 170 and highest diastolic less than 106, disregard . . ."

Several things connected with the 1950 checkup are worthy of note. One is that the history given by the insured to the Boston doctors began with his discharge from military service and included the period of his coronary thrombosis and ended more than six years before the application for insurance; and the moderately elevated blood pressure was manifestly connected in insured's mind with the thrombosis experience.

The examination in 1950 by the doctors of Smithwick Foundation showed insured's blood pressure to be high, but the other tests for hypertension were negative. At that time, insured was scarcely two years away from the grueling experience of the "full blown myocardial infarction" and he was in Boston with full responsibility for a very sick brother, charged with the duty of deciding whether a serious operation should be performed. No doctor who testified held the idea that such an experience would not of itself produce an unusually high blood pressure resulting from nervousness and worry. That the elevation of pressure then discovered was connected with emotional stress is buttressed by the

fact that, when the stress was eliminated by sedation, his pressure dropped to the subnormal figures of 110 70.

Under like circumstances as those detailed with respect to the first visit, insured was examined at the same institution Nov. 25, 1951, and again in June, 1953. Both times, the blood pressure levels were well under those Lincoln had established as such a safe standard as to be disregarded.

In connection with that evidence, it should be noted that the insured's doctor brother testified that he had, during the years, taken the insured's blood pressure on numerous occasions and had never found it high; and Dr. Ruskin testified substantially the same thing. Except, therefore, for the one time in 1950 when insured was under such tremendous nervous strain, there was no showing that insured's blood pressure ever exceeded that which Lincoln instructed its examiners to disregard. In addition to this, insured's blood pressure was apparently satisfactory to American General when it issued its policy in 1954, and was 130 85, as noted by the insurer's examiner on the report of examination of insured upon which this policy was issued. Moreover, on the preliminary report made Nov. 1, 1956, as a feeler to determine whether Lincoln would be interested in issuing the policy, it was noted that a current or recent 12-lead electrocardiogram would be required by it.

During all the years of their association in the practice of medicine insured had never mentioned to his doctor brother

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[3]The average blood pressure found in 1951 was, lying, systolic 138, diastolic 86, and standing, systolic 140 and diastolic 99; in June, 1953, the figures were lying, systolic 148, diastolic 92, and standing, systolic 136, diastolic 96.

that he suspected that he was suffering from hypertension of any sort; nor had he mentioned the subject to his doctor (Ruskin) nor to his wife.[4]

Appellee urges that the fact that insured took the drug Raudixon sporadically was indicative of the fact that he knew he was suffering from hypertension. The doctors disagreed about the properties of this drug, some considering it primarily a good tranquilizer and only the mildest remedy for hypertension. It was also shown that the insured followed at times a salt poor diet. Such a course was indicated for hypertension, but it was also indicated for loss of weight, which insured was constantly trying to achieve, and for the lessening of the likelihood of recurrence of coronary thrombosis, which was a constant source of worry to him and a logical explanation for much of the proof upon which appellee places the greatest reliance.

If insured was suffering from hypertension, there was ample proof that it was not essential hypertension, that is, chronic or presistent, amount to a disease; but was occasional hypertension resulting from the fact that he was a tense individual, reacting spontaneously to such stimuli as worry, excitement, frustration. Those closest to him stated that he appeared to be in good health, led a normal life, and did not direct his effort at avoiding strain and tension which would ordinarily be expected of a doctor who suspected that he was the victim of essential hypertension. The foregoing brief

[4]This Court indicated, in the recent case of World Insurance Co., etc. v. Pines, 1956, 255 F. 2d 464, 467, that the fact that the insured there never told his family or close friends that he had nephritis was strong support for the finding of the trial judge that, if he did have the disease, he did not know it.

analysis demonstrates that reasonable minds would probably reach different conclusions with respect to the questions whether insured had hypertension at all and if so, its character; whether he knew of the condition if it existed and considered it important; whether he deemed it a part of the thrombosis episode and other like questions. That being so, they presented issues of fact and not of law.

The testimony of Dr. Ruskin was of particular importance to appellant. He was a professor in the University of Texas and had written some eighty papers on cardio vascular diseases. He first examined insured in 1949 and continued to see him and confer with him through the years until the end of 1956. He had never found any evidence from his extended examinations that insured had hypertension in any form, and it had never been mentioned to him. While on the stand he told of writing a letter in February, 1955 to American General Life Insurance Company, which is reproduced in the margin.

"American General Life Insurance Company, Houston 1, Texas.
"Attention: Dr. Ghent Graves, Medical Director
Dear Mr. Graves:

Dr. Roosth has been under my care since December 2, 1959, at which time the second EGG sent you was taken. He had a myocardial infarction in August of 1948; was treated in Tyler and recovered uneventfully. At that time G. I. series, gall bladder series barium enema, all negative. I have seen him frequently until June 1954, during this time he has never had any symptoms and his physical examination, including size of heart and fluoroscopy of the heart have always been negative except for blood pressure findings—highest on December 2, 1949, 105/100, but always since then below 140/90. He has taken excellent care of himself, including prolonged anticoagulant therapy under my direction. Report from Massachusetts Memorial Hospital on June 1943 noted essentially the same findings and EGG (Q^2 and Q^3). Urinalysis blood counts, sedimentation rates, all normal.

Prompt return of EGGs will be appreciated.

With best regards,
Sincerely yours,
Arthur Ruskin, M.D.
Assoc. Prof. Int. Med.
Univ. of Tex. Med. Br.
Galveston, Texas."

Mr. Balay, underwriter for Lincoln National, admitted that the letter was in Lincoln's file. The letter was submitted to Lincoln by American in connection with insured's application to American for insurance. Lincoln reinsured a great many of American General's risks, and it was the practice of the two companies to exchange information.[6] Mr. Balay also was examined concerning confidential reports made by investigators who had contacted people who were close to the insured and the report showed him to be a man in apparent good health and one who worked regularly.

This letter of Dr. Ruskin's, taken in connection with the underwriter's testimony, would warrant the finding by the jury that the insurer was in possession of facts sufficient to put it upon inquiry at the Massachusetts Memorial Hospital, and that failure so to do would amount to a waiver of the claim that the appellant is barred from recovery by failure on the insured to reveal the examinations made in Boston. At all events, the evidence has persuasive force towards warranting the jury in finding that the insurer did not rely on such failure of the insured to disclose the fact of said examination.[7]

A careful reading of the entire episode involving the examinations by insured in Boston leads to the conclusion

[6]The doctor Ruskin letter referred to an examination at Massachusetts Memorial Hospital in June, 1943, but he explained that this was a typographical error and the date should be 1953. The content of the letter shows that the date is incorrectly stated, because it refers to an examination made after insured's heart attack in 1948.

[7]Perry et al. v. Citizens Life Ins. Co., Ct. Civ. App. Tex., 1942, 163 S. W. 2d 743; Terry et ux v. Texas Prudential Ins. Co., Ct. Civ. App. Tex., 1935, 77 S. W. 2d 761; American Fire & Casualty Co. v. Eastham, 5 Cir., 1950, 185 F. 2d 729; and Pilot Life Ins. Co. v. Pulliam Motor Co., 4 Cir., 1956, 229 F. 2d 912.

that failure to reveal these examinations is not nearly as damaging to appellant's case as the Company contends. At all events, the evidence, considered in connection with the countervailing proof on appellant's behalf, raises nothing more than a jury question on this phase of the case.

Much of what has been written applies to the contention of appellee that the insured gave knowingly false answers to questions 11 and 14 (g) and (h).[8] From what has been said above it is clear that insured did not commit any fraud when he answered that he was not at that time suffering from any disease or disorder.[9]

This brings us to the alleged fraud in answering subparagraphs (h) and (i) of Question 14, asking whether insured had had X-ray, electrocardiogram or blood studies, and whether he consulted any physicians or practitioners the past five years for any other causes. In judging insured's answers to these questions, it must be borne in mind that he had consented to a trial inquiry on November 1st, had signed an application on November 10th, and a subsequent application on December 24, 1956, in all of which he had disclosed his myocardial infarction of 1948 and the fact that the American General Insurance Company had rated him up because of the increased risk resulting from it. Without dispute he had had many electrocardiograms made and had been in con-

[8] It appears that there is no evidence indicating that insured's answer was false when he gave a negative response to the question whether any physician had told him his blood pressure above normal within the past five years.

[9] Excepting, of course, the disabilities following the heart attack of 1948, which the court below and all parties except from the questions presented.

stant touch with Dr. Ruskin and his brother in connection with the aftermath of the 1948 seizure. Dr. Ruskin testified, for instance, that in November or December, 1956, Dr. Young (Lincoln's examiner) and insured telephoned him long distance several times in connection with "a development of immature contractions or extra beats, skips and jumps of his heart which he was concerned about." The doctor did not consider the development of consequence, stating that they frequently occur following myocardial infarctions as well as in cases of perfectly normal individuals "when they are nervous, or exhausted." Manifestly insured had no cause to withhold from the insurer the information that he had consulted these doctors frequently.

Anyone would know that a coronary patient remains heart conscious and is reminded of his disability by the necessity of taking medicine constantly. The form of the question is such that insured could logically have thought that they referred to his consultation with doctors, causing electrocardiograms to be made, etc., with respect to disabilities other than those connected with the 1948 seizure. At least, the jury was justified in finding that he did honestly so construe the questions, even if they thought that he was mistaken. The sizure of 1948 was an open book and insurer was given opportunity, at its leisure, to make any investigation it desired with respect to it and its consequences and presumably it did so. In judging insured's intent, his answers must be considered from the viewpoint of what was in his mind when he gave them.

But brief consideration need be given to the contentions which appellee urges so fervently, based upon hindsight. These are predicated upon the death certificate issued to cover the demise of insured and the autopsy performed with the consent of appellant. The death certificate furnished by the attending physician of insured showed that the condition directly leading to death was sub-arachnoid hemorrhage and the antecedent causes were ruptured aneurysm due to Circle of Willis. The parties agree that, if the cause of death was that stated in the certificate, there would not be proof that the misrepresentations relied upon were material or that they increased the risk, because supposed hypertension would not be embraced within the cause as certified.

But the Company seeks to avoid the statements of the death certificate, claiming that the autopsy demonstrates that the certificate is in error and that the death resulted from a cause to which hypertension would be a contributing factor. Much of the hardest fighting revolved around this conflict between the death certificate and the autopsy as established by the report and the testimony of the doctor who made it. The Company's witnesses gave their opinions that, if the findings of the autopsy were correct, the insured must have died of hypertension. Appellant's doctors disagreed. Much of the expert testimony of appellee is discounted because the doctor who performed the autopsy admitted that, although he did not find evidence of an aneurysm, there was a possibility and even probability that evidence of

its existence had been destroyed by its "explosion."[10] These conflicts were for jury decision.

An extended discussion of the law is not indicated, as appellee concedes in its brief that its defense cannot succeed unless these five elements are proven: "(1) A false representation; (2) in reference to a material fact; (3) made with knowledge of its falsity; (4) and with intent to deceive; (5) with action taken in reliance upon the representation." This accords with the appellant's argument and since all agree that this case is to be decided under Texas law and that, in considering it, we are sitting as a Texas Court, it will be sufficient if we simply list the authorities which establish these principles as the law of Texas.[11]

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[10]"I wish to be explicit about this, that I have stated in this autopsy protocal that I did not find an aneurysm. This does not, cannot be taken that there was not one present at one time or another because this hemorrhage which Dr. Roosth suffered was a massive thing which would, I think explosive would be the best word to describe the damage that type of thing can produce. And it is possible and it may be probable that an aneursym existed and an aneurysm served as the weak spot through which the hemorrhage started and that the entire aneurysm was destroyed and could not be recognized at the time of the autopsy, I would say that is possible, that may be what actually happened."

[11]14 Vernon's Texas Civil Statutes, Art. 21.16 provides:

"Any provision in any contract or policy of insurance issued or contracted for in this state which provides that the answers or statements made in the application for such contract or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable shall be of no effect, and shall not constitute any defense to any suit brought upon such contract, unless it is shown upon the trial thereof that the matter or thing misrepresented was material to the risk or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case."

And it is provided in 14 Vernon's Texas Statutes, Art. 21.18:

"No recovery upon any life, accident or health policy shall ever be defeated because of any misrepresentation in the application which is of material fact and which does not affect the risks assumed."

And see Clark v. National Life Insurance Co., 1947, S. Ct. Tex., 200 S. W. 2d 820; Washington National Insurance Co. v. Anderson, C.C.A. Tex., 1936, 94 S. W. 2d 263; Great Southern Life Insurance v. Darfe, 1941, Comm. of App. Tex., 151 S. W. 2d 197; Vann v. National Life and Accident Insurance Co., 1930, Comm. of App., Tex. 24 S. W. 2d 347; and Coxson v. Atlanta Life Insurance Co., S. Ct. Tex., 1944, 179 S. W. 2d 943.

Appellant relies heavily upon the decision of this Court in *Madden v. Metropolitan Life Insurance Co.*, 1943, 138 F. 2d 708. A reading of the case shows that we held that "a representation, though false, does not avoid the policy unless it was made with conscious intent to deceive; that whether it was so made is normally for the jury; and that (even though a question relates to matters of fact such as whether there was a consultation rather than of opinion as to whether insured was ill or suffered from a disease), unless the evidence admits of no other conclusion than that there was an intent to deceive, it is for the jury to determine whether the answer was fraudulent in fact, that is, made with intent to deceive, or whether it was given in good faith, that is, without conscious intent to defraud."

We were there applying the law of Florida as announced in *Metropolitan v. Poole*, 1941, S. Ct. Fla., 3 So. 2d 386. The law of Florida as announced in that case seems to square with the law of Texas. Indeed, as above stated, there seems to be no disagreement between the parties that appellee's affirmative defense must fall unless it proved that insured made false representations to material facts with knowledge of their falsity and with intent to deceive, and that the policy was issued in reliance upon such representations. And these propositions must be established by proof which can lead reasonable minds to only one conclusion. This, we believe, appellee has failed to do.

The contention of appellee that insured was not in good health when the policy was issued and delivered, so that it did not become effective under the terms of the policy,

falls under the same analysis of facts as that set forth above in answering the contention that false answers were given in the application.

The burden was upon the appellee to sustain this contention and to show that there was no proof from which the jury could have found that insured was in good health at said time, excepting, of course, the disability under which he labored resulting from his coronary thrombosis. This phase of the law of Texas was discussed in our recent case of *American Home Life Ins. Co. v. Zuniga*, 1955, 228 F. 2d 403. Under that case and the Texas cases discussed in it, this question was also one for jury decision.

Appellee labors here under the universally accepted rule that "Fraud is never presumed, and the burden [is] on appellant to prove it with reasonable certainty by a preponderance of convincing evidence."[12] That rule certainly has appropriate application here. The agent seeking to induce appellee to accept Dr. Roosth as its insured represented more than once that he was a prominent and outstanding citizen in his community. Appellee's evidence shows that he was a man of means. A good reputation does not come without effort. It results from adherence day by day to honor and decency and good faith. It ought not to be destroyed by proof which is not clear and convincing. It is a rare case which would justify the finding that, as a matter of law, a man of character has stooped to the cheap fraud relied upon here. We think that it was error for the judge so to decide. The case, in all of its aspects, should be decided by a jury.

[12]Williams v. Penn Mutual Life Ins. Co., 5 Cir., 1928, 27 F. 2d 1, 3.

In order that, on another trial, it may be submitted to a jury for decision the judgment of the court below is reversed and the case remanded.

REVERSED and REMANDED.

APPENDIX D

HUTCHESON, Chief Judge, Dissenting:

I agree fully with the majority that in a suit only a policy of life insurance, in order for the defendant to recover, there must be shown: a false representation, in reference to a material fact, made with knowledge of its falsity, and with intent to deceive. I agree, too, that under the controlling statutes and case law, normally these are questions of fact "to be determined by the court or jury trying the case."

A. the Texas authorities show, however, while this is normally so, this does not mean that every insurance case must be sent to the jury. On the contrary, it is the established law of Texas that in the trial of such a case, as in the trial of other civil cases, uncontroverted issues are not to be submitted to a jury but are proper subjects for preemptory instructions. Tex. Jur. 41B, Sec. 401, pp. 489-494; *Clark v. National Life & Accident Insurance Co.*, 145 Texas 575; *Jefferson Life v. Quehler*, 298 S. W. (2) 619.

Under that rule, it seems clear to me that, taken in the light most favorable to the plaintiff, it must be concluded that the evidence incontrovertibly, that is as matter of law, establishes the facts required to support the instructed verdict.

I have not overlooked the fact, of which the opinion makes so much, that the insured was recognized as a substandard risk because of his having had a coronary thrombosis in 1948. Indeed, I think this fact cuts the other way. Taken in connection with the undisputed evidence that the misrepresented fact was greatly material to, and greatly increased the substandard risk being assumed, the deliberate

falsity and materiality of the representations stand starkly out. In short, it seems to me that when this case is viewed, piecemeal or as a whole, in the light of the undisputed facts of the case, including the fact admitted in appellant's brief that the insured "made misrepresentations in this application concerning (1) his failure to report his examination at Massachusetts Memorial Hospital, (2) his failure to report an examination by a physician within the past five years" and that "on these questions defendant would be entitled to an instructed verdict but for the necessity of proving that they concerned matters (1) material to the risk, (2) were made with the intent to deceive, and (3) were relied on", it is taxing credulity far beyond its utmost limits to contend or claim that what was said and left unsaid was not done knowingly, deliberately, and with the intent to deceive.

It will serve no useful purpose to set out the evidence. The stark facts which dominate this case and force the conclusion that the district judge was right in directing a verdict, including particularly plaintiff's skill and proficiency as a doctor in the very field with which this admitted condition of his hand to do, are sufficiently stated in the majority opinion. Cases which I think require the view I take are: *Rhodes v. Metropolitan Life*, 172 F(2) 183; *Pence v. United States*, 316 U. S. 332; *McDaniel v. United States*, 196 F(2) 29; *United States v. Stratton*, 232 F(2) 880.

I respectfully dissent.

A true copy

Test: /s/ Edward W. Wadsworth

EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

(SEAL)

Sep. 29, 1959

APPENDIX E

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1961

No. 18,830

D. C. Docket No. 2320 Civil

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Appellant,

versus

ROSA LEE LEAMAN ROOSTH,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before Tuttle, Chief Judge, Hutcheson, Rives, Cameron, Jones, Brown, Wisdom, Gewin and Bell, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was taken under submission by the Court En Banc upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the

said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, The Lincoln National Life Insurance Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Hutcheson, Jones and Bell, Circuit Judges, Dissent."

July 19, 1962

Issued:

APPENDIX F

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18830

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Appellant,

v.

ROSA LEE LEAMAN ROOSTH,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(September 27, 1962)

On Petition for Rehearing

Before TUTTLE, Chief Judge, HUTCHESON, RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

PER CURIAM:

It is ORDERED that the Petition for Rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.

Judge Hutcheson, Judge Jones and Judge Bell dissenting.

Petition for rehearing filed 8/8/62

Petition for rehearing denied 9/27/62